STATE OF MICHIGAN

COURT OF APPEALS

GEORGE A. GALLAGHER III,

Plaintiff/Counter-Defendant-Appellee,

and

DAVID FERGUSON, SHARON FERGUSON-MILLER, SUZAN INMAN, JEANNE JOHNSON, SANDRA KIPP, JAMES DILLARD, DAVID FERGUSON, and the RONALD FERGUSON EDUCATION TRUST,

Intervening Plaintiffs/Counter-Defendants/Third-Party Defendants,

v

RICHFIELD EQUITIES, LLC and RICHFIELD LANDFILL, INC, d/b/a GENESEE LANDFILL,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellants.

and

KITTREDGE KLAPP, the DANIEL FERGUSON SUBTRUST, and RONALD FERGUSON,

Third-Party Defendants.

UNPUBLISHED
April 14, 2009

No. 283246
Genesee Circuit Court
LC No. 05-082225-CK

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Defendants/counter-plaintiffs/third-party plaintiffs Richfield Equities and Richfield Landfill ("defendants") appeal as of right a final judgment in favor of plaintiff/counter-defendant George A Gallagher III ("plaintiff"). The judgment is based on the trial court's dismissal of defendants' counterclaims against plaintiff. This matter arises out of defendants' purchase in

2001 of a troubled landfill in Genesee County. The landfill had a history of operating problems, and defendants were aware that it was in bad condition when they purchased it, but the landfill's problems turned out to be more significant than defendants knew when they closed on the purchase. Upon incurring significant environmental remediation expenses, defendants stopped making payments to plaintiff, whereupon plaintiff commenced this suit. Defendants counterclaimed for fraud, misrepresentation, breach of contract, and statutory liability pursuant to the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. We affirm in part, reverse in part, and remand.

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion decided on the basis of MCR 2.116(C)(10) entails consideration of all evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party; summary disposition is warranted where the evidence shows no genuine issue as to any material fact. *Id*., 567-568. We also review de novo as a question of law the proper interpretation of both contracts and statutes. *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008).

After reviewing the record, we find the trial court's factual determinations entirely supported by the evidence. Originally, plaintiff's father and Ronald Ferguson each owned 50 percent of the shares of Richfield Landfill, Inc., which in turn was the corporate entity that owned the landfill. Ferguson was the president of the landfill until his death. Until he died, he "ran everything." The landfill closed in 1991,[1] and Ferguson died in 1992. At that time, Ferguson's interest passed to his trust. Roughly contemporaneously with Ferguson's death, plaintiff purchased his father's interest and became president, apparently just because someone needed to. Because the landfill was closed, plaintiff believed that he only had two responsibilities: to maintain the fence around the landfill, which was frequently damaged by trespassers, and to maintain the level of leachate in the landfill.

Particularly relevant to this case, leachate is a hazardous substance that is created when water – such as from precipitation – percolates through the waste in a landfill, picking up chemicals as it goes. It accumulates at the bottom of the landfill on an impermeable liner. If it is not pumped out and removed, it will eventually build up to the point at which it overflows the liner and contaminates the surrounding soil.

Plaintiff received a salary for his position as president. However, the landfill had no income after it closed, and most of the money expended on its bills came from plaintiff's father. Neither Ferguson's trust, the trust's trustee, nor the trust's beneficiaries contributed any money, and apparently they did not provide any other form of input into anything plaintiff did.[2] At some

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[1] Plaintiff believed that the landfill "ran out of space to dump," but apparently it was actually closed because the owners failed to comply with a consent judgment reached with the Department of Environmental Quality in 1989, and so the landfill became "unlicensed."

[2] Defendants included claims against these parties, but defendants have not appealed the dismissal of any of those claims.

point during plaintiff's tenure as president of the landfill, his father decided to stop contributing any more money. Among other matters, plaintiff had previously retained one or more companies to pump leachate on a regular basis, but with no more money forthcoming, plaintiff terminated that regular pumping. Gallagher testified that he "supposed" that leaking leachate could contaminate groundwater, leading to expensive clean-up requirements, but he had "[n]ot really" given the matter any consideration.

The three primary principals of defendant Richfield Equities, LLC, were C. Thomas Toppin, an attorney; Bernhard Rumbold, a chartered chemist[3]; and Frederick Hambleton, who held a doctorate in chemical physics. Rumbold and Hambleton had engaged in a variety of prior business ventures, at least one of which involved some kind of hazardous waste, but they had no prior direct experience with a landfill. They had some interest in the Richfield Landfill for many years, but did not become seriously interested in purchasing it until two or three years before the purchase. In the meantime, they were aware that the landfill had problems. In particular, they were aware that it had actually had prior leachate "outbreaks," although none that appeared recent. They were also aware that the landfill had "legal problems" because the Department of Environmental Quality believed that there was a "major pollution" concern. Moreover, they observed that "the landfill was in a pitiful condition," although they believed plaintiff's assertions " that the landfill had been maintained and run in accordance with the law and that all of the necessary stuff that's done in stewardship of the landfill had been done." Defendants did not receive from plaintiff all of the records they contend they should have received, but they made no written request.

The contract for the sale of the Richfield Landfill to Richfield Equities was signed in May 2001, but it was contingent on whether Richfield Equities could obtain a consent order from the DEQ that would permit the Landfill to resume operations. The closing actually occurred in escrow; the DEQ gave Richfield Equities the consent order in August 2001. In the meantime, Richfield Equities had access to the Landfill site but no right to do anything with it. During the entire first half of 2001, before closing, the principals were aware that leachate levels in the landfill were elevated. Indeed, although there was testimony that finding an actual contamination plume was very difficult, the first step in investigating leachate was the simple and relatively accurate step of checking the level in the leachate drainage sump. Hambleton did so on several occasions, and at the time Richfield Equities took over, those levels were actually more than one foot higher than permitted by the DEQ. Despite being aware of those levels, and despite being advised by the DEQ "that [the DEQ] believed there were contamination issues with the groundwater," Richfield Equities closed on the purchase because, on the basis of the data and "verbal information we had," Richfield Equities believed "that that was not the case."

It turned out, on subsequent investigation, that leachate had escaped from the landfill and contaminated the surrounding soils. The cost of remediation was significant, and although

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[3] A chartered chemist is a professional qualification in the United Kingdom that is approximately equivalent to a professional chemist in the United States. Rumbold and Hambleton were both originally from the United Kingdom.

Richfield Equities initially paid regular "royalties" due under the sale agreement, when it concluded that the cost of remediation constituted an offsetting claim, it ceased making payments to plaintiff; plaintiff commenced this suit on the basis of defendants' failure to make payments. Defendants' "defense" was to commence a counterclaim asserting that, for one reason or another, plaintiff was liable for some or all of the cost of remediating the leachate contamination. The merits of that counterclaim are the subject of this appeal, although we note that defendants have tacitly abandoned their tort-based claims.[4]

We first briefly address defendants' claims based on breach of contract. Defendants assert, and we agree, that a contractual warranty term is essentially a bargained-for purchase by the buyer of insurance from the seller that some fact is as represented. It is therefore not defeated by the buyer's mere suspicion that those facts are actually untrue, so long as the buyer genuinely relied on the warranty being – in the abstract – a part of the contract. See *Galli v Metz*, 973 F 2d 145, 150-151 (CA 2, 1992), which is not binding on this Court, but we find persuasive. It is therefore true that the buyer's "reasonable reliance" on the facts stated in a *contractual* warranty term is not the standard for evaluating whether the seller is liable for breaching that term. However, a buyer cannot genuinely rely on a warranty term if it should be *patently obvious* to the buyer that those facts are blatantly false. *Hardy v Stoepel*, 162 Mich 676, 677-678-679; 127 NW 703 (1910). More importantly in this case, a buyer cannot rely on a contractual warranty that was not included in the contract. *Id*.

Defendants concede that the contract did not include an explicit statement that leachate had been properly pumped. In fact, the contract contains almost the opposite. The sale documents included at least two explicit statements that the Department of Environmental Quality was asserting violations of rules pertaining to contamination. Defendants contend that plaintiff failed to disclose "material liabilities" that could give rise to significant obligations like the cost of leachate remediation. But the contract documents, when read as a whole, treat the environmental concerns specially. Plaintiff's failure to pump leachate unambiguously falls under the umbra of "ongoing rules violations" claimed by the Department of Environmental Quality. All parties were aware that the DEQ was alleging groundwater contamination. The contract does not contain any provision seeming to warrant that the DEQ's position is incorrect. Rather, environmental matters are addressed specifically, and within that context, violations of DEQ rules are carved out as an area in which the buyer must beware. We simply find no warranty in the contract on which defendants could have relied pertaining to environmental contamination of the sort alleged.

Defendants also assert that plaintiff is liable under the terms of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. We lack a record sufficient to

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[4] The trial court held that defendants could not prevail on any tort-based fraud or misrepresentation claims because it was unreasonable for them to have relied on plaintiff's statements that leachate had been properly pumped during his tenure as president. In a nutshell, defendants' claims in this appeal are that they still have remaining causes of action that are meritorious irrespective of whether their reliance was unreasonable.

determine this, but we agree that the trial court misconstrued one of the sections on which defendants rely.

"The NREPA (formerly the Michigan Environmental Response Act, [(MERA, MCL 299.601 et seq)], is a complex statutory scheme intended to provide for the identification of environmental contamination and to provide for response activities at such sites." *Gumma v D & T Const Co*, 235 Mich App 210, 220; 597 NW2d 207 (1999). Among other provisions, MCL 324.20126 provides that "various persons shall be liable for costs related to the removal of the environmental contaminants." *Id*. In particular, it imposes liability on "[t]he owner or operator of a facility if the owner or operator is responsible for an activity causing a release or threat of release," MCL 324.20126(1)(a), and "[t]he owner or operator of a facility at the time of disposal of a hazardous substance if the owner or operator is responsible for an activity causing a release or threat of release." MCL 324.20126(1)(b). A "'[r]elease' includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance into the environment." MCL 324.20101(bb).[5] "Such an owner or operator is jointly and severally liable for '[a]ny ... necessary costs of response activity incurred by any . . . person consistent with rules relating to the selection and implementation of response activity[.]' MCL 324.20126a(1)(b)." *Howell Twp v Rooto Corp*, 258 Mich App 470, 479-480; 670 NW2d 713 (2003).

In relevant part,[6] the NREPA defines "owner" as "a person who owns a facility," MCL 324.20101(z), and it defines "operator" as "a person who is in control of or responsible for the operation of a facility." MCL 324.20101(y). The definitions under the predecessor MERA were substantially identical. "Owner" was defined as "a person that owns a facility," MCL 299.603(t), and "operator" was defined as "a person that is in control of or responsible for the operation of a facility." MCL 299.603(u). In examining the definitions under the MERA, this Court explained that, because they were defined in the present tense, the predecessor to MCL 324.20126(1)(a) must be interpreted "as applying to *current* owners or operators of a facility." *Farm Bureau Mut Ins Co of Michigan v Porter & Heckman, Inc*, 220 Mich App 627, 642-643 n 11; 560 NW2d 367 (1996). The trial court correctly concluded that MCL 324.20126(1)(a) was inapplicable to plaintiff because plaintiff was neither an owner nor an operator at the time of the suit.[7]

Significantly, however, this Court in *Farm Bureau Mut Ins* carefully distinguished subpart (a) from, among other things, subpart (b): "the remaining 'operator' provisions . . . apply to noncurrent operators; provision b applies to operators of the facility at the time the disposal occurred, i.e., former operators. . ." *Farm Bureau Mut Ins Co of Michigan, supra* at 643 n 11. This is entirely consistent with the distinction drawn in the present statute: MCL

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[5] It is undisputed that the leachate contamination at issue in this case constitutes a "release" within the meaning of the NREPA.

[6] The NREPA and the MERA both contain numerous, detailed exceptions to these definitions, none of which are pertinent to this case.

[7] We note also that we agree with the trial court's disposal of all other subparts of that statute, other than subpart (1)(b).

324.20126(1)(a) applies to owners or operators who *are* responsible for a release, and MCL 324.20126(1)(b) applies to owners or operators who *were* responsible for a release.

The trial court held that plaintiff was also not liable under MCL 324.20126(1)(b) because he was never an owner or operator "at the time of disposal of a hazardous substance." A "disposal" is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous substance into or on any land or water so that the hazardous substance or any constituent of the hazardous substance may enter the environment or be emitted into the air or discharged into any groundwater or surface water." MCL 324.20101(i). This definition appears to be functionally identical to a release, but phrased so that the hazardous substance *could* enter the environment, as opposed to *actually* doing so. We therefore disagree with the trial court's finding that a "disposal" depended on whether the landfill was operationally receiving waste.

Although there is no Michigan case law on point, the similar and often persuasive[8] federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 USC 9601 *et seq* (CERCLA), apparently reaches the same conclusion. Under that framework, "'disposal' stand[s] for activity that precedes the entry of a substance into the environment and 'release' stand[s] for the actual entry of substances into the environment." *United States v 150 Acres of Land*, 204 F 3d 698, 706 (CA 6, 2000). Thus, accumulation of a hazardous substance to the extent that it could escape into the environment constitutes a "disposal." "Disposal" as defined in *150 Acres of Land* does require some kind of active human conduct. *Id*. at 705-706. Therefore, no "disposal" takes place if a party merely passively fails to remove contaminants that have come onto their property, even if the party knows of the contamination. *Bob's Beverage, Inc v Acme, Inc*, 264 F 3d 692, 697-698 (CA 6, 2001).

Plaintiff argues that leachate accumulation is passive and therefore cannot constitute a "disposal." But we find that "disposal" actually constitutes a perfect description of leachate accumulation in a landfill that *precipitates* a "release" thereof into the surrounding soil. This is not a situation of passive failure to do anything about a preexisting condition: both federal cases were concerned with property owners who just happened to inherit a preexisting condition and proceeded to ignore it. In contrast, it is undisputed that pumping leachate was an affirmative obligation of whomever was ultimately responsible for maintaining the landfill. Plaintiff made a conscious, voluntary decision to cease doing so. Although this does not rise to the level of actively placing hazardous substances into the landfill, it goes beyond merely ignoring a preexisting condition. We find plaintiffs decision to cease pumping leachate as required to be a sufficiently affirmative human activity to render the leachate accumulation a "disposal" under the NREPA.

Although plaintiff was never technically the owner of the Richfield Landfill, he was "a person who is in control of or responsible for the operation of a facility." Because leachate accumulation *is* a "disposal," plaintiff was an "operator" of the landfill "at the time of disposal of a hazardous substance." MCL 324.20126(1)(b). However, it is not clear to us from the record

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[8] See, e.g., *Genesco, Inc v Michigan Dep't of Environmental Quality*, 250 Mich App 45, 50; 645 NW2d 319 (2002).

whether there is any outstanding factual dispute as to whether plaintiff's failure to pump leachate *actually* caused the release of that leachate. We therefore cannot determine whether plaintiff was "responsible for an activity causing a release." If so, he meets the definition of a liable party under MCL 324.20126(1)(b).

The trial court's holding that plaintiff cannot be a liable party under MCL 324.20126(1)(b) is reversed; the trial court is affirmed in all other respects. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis